No. 88-535

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In The Supreme Court
Of The
United States

OCTOBER TERM 1988

LOCAL FREIGHT DRIVERS, LOCAL 208,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMERICA,
Petitioner,
vs.
ROZAY'S TRANSFER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN P. PEPE
(Counsel of Record)
CLIFF FONSTEIN
O'MELVENY & MYERS
400 South Hope Street
Fifteenth Floor
Los Angeles, California
90071-2899
(213) 699-6000
Counsel for Respondent
Rozay's Transfer

QUESTIONS PRESENTED

1. Does Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301") provide federal courts with jurisdiction to decide claims based on a union's fraudulent contractual misrepresentations which induce an employer to sign a collective bargaining agreement making the employer liable to a trust fund under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.?

2. Does Section 301 provide federal courts with concurrent jurisdiction to decide claims based on a union's fraudulent contractual misrep-

resentations even though those claims may also arguably be unfair labor practices within the jurisdiction of the National Labor Relations Board (the "N.L.R.B.")?

3. Is an employer's reliance on a union leader's fraudulent contractual mispresentations unreasonable simply because the misrepresentations involved the purposeful concealment of a trust fund vote?

LIST OF PARTIES AND RULE 28.1 LIST*

The parties to the proceeding below were petitioner Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters Local 208"), respondent Rozay's Transfer ("Rozay's") and amici curiae Southern California District Council of Laborers, International Union of Operating Engineers, Local Union No. 12, Merchants and Manufacturers Association, and the California Trucking Association.

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* Respondent Rozay's has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondent, Rozay's Transfer, respectfully submits the following Opposition to Petitioner's Request for a Writ of Certiorari.

OPINIONS BELOW

This is the second time a Petition for Writ of Certiorari has been filed in this Court involving the same underlying dispute. The first case, Southwest Administrators, Inc. v. Rozay's Transfer, 791 F.2d 769 (9th Cir. 1986), cert. denied, __ U.S. ___, 107 S. Ct. 951, 93 L. Ed. 2d 999 (1987) was a pension collection action brought by the Western Conference of Teamsters Pension Trust Fund (the "Trust") against Rozay's in which the Ninth Circuit Court of Appeals ("Ninth Circuit") affirmed a judgment against Rozay's for $122,789.03 in retroactive pension contributions, liquidated damages, attorneys' fees, plus

interest. Southwest Administrators, 791 F.2d at 772. The Ninth Circuit reached this result even though it also acknowledged that Teamsters Local 208 fraudulently induced Rozay's into signing the collective bargaining agreement (the "Agreement") which gave rise to its liability to the Trust. Id. at 771-72. The present case is Rozay's suit against Teamsters Local 208 for fraudulently inducing it to sign the Agreement.

At the core of both cases is Teamsters Local 208's fraud. Teamsters Local 208's President, Archie Murrietta, fraudulently induced Rozay's President, William S. Rozay, to sign the 1981-1984 Agreement by purposefully

deceiving him as to the Trust's vote to require retroactive pension contributions, an act of fraud which led to Rozay's liability in Southwest Administrators. Id. at 772. At a status conference called to announce the Southwest Administrators decision, the district court described Murrietta's conduct in the harshest terms:

> "Now if I have ever in my life seen a case of pure fraud it is this case.
>
> "Mr. Murrietta deliberately, willfully, and knowingly defrauded Mr. Rozay. There isn't the slightest doubt about it.
>
> "I have never in my life seen a situation which was clearer in terms of fraudulent conduct than this situation with respect to Mr. Murrietta.
>
> " . . . .

"[I]t is a disgusting set of facts, and I am using the word 'disgusting' deliberately with very calm reflection.

"I do not regard it as proper conduct on the part of a union to defraud an individual who is negotiating with them, and then have the trust fund take the benefit of it, and that is exactly what happened here.

". . . .

"It is the most unfair conduct I have ever seen.

". . . .

"[T]he result I have reached is totally inequitable.

". . . .

"I feel this is one of the very few times when I feel really that I have done the wrong thing." (App. A at A-2 -- A-11.)*

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* "App. A at A-2 -- A-11" refers the Court to pages 2 through 11 of Appendix A attached hereto. The reporter's transcript of a special status confer-

(Footnote Continued)

Despite the magnitude of Murrietta's fraud, the district court ruled that it was no defense to the Trust's collection action. The Ninth Circuit affirmed the district court's decision, holding that Teamsters Local 208's fraud in the inducement rendered the Agreement "voidable" rather than "void" and, thus, not a defense to a trust fund's collection action.* Southwest

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(Footnote Continued)
ence to announce the Southwest Administrators decision is reproduced as Appendix A, infra, A-1 -- A-12.

* The Ninth Circuit also invited Rozay's to file an action for indemnification against Teamsters Local 208. Southwest Administrators, 791 F.2d at 777 n.4; Rozay's Transfer v. Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 850 F.2d 1321, 1331.

Administrators, 791 F.2d at 774-75. This Court denied certiorari on January 27, 1987.

On October 26, 1984, Rozay's filed the present complaint against Teamsters Local 208. By judgment entered on July 2, 1986, the district court again found Teamsters Local 208's conduct fraudulent. It rescinded the fraudulently induced Agreement and required Teamsters Local 208 to indemnify Rozay's the monies it owed the Trust as a result of Southwest Administrators and the legal fees which it incurred in defending that case.

Teamsters Local 208 appealed this decision to the Ninth Circuit on

October 22, 1986, and on June 24, 1988, the Ninth Circuit affirmed the district court's decision. Rozay's Transfer v. Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 850 F.2d 1321 (9th Cir. 1988). On the issue of Teamsters Local 208's fraud, the Ninth Circuit noted: "The district court obviously found the testimony presented by Rozay's Transfer more credible than Murrietta's, and with good reason." Id. at 1327.

JURISDICTION

Rozay's adopts the statement of Teamsters Local 208.*

STATUTES INVOLVED

Rozay's adopts the statement of Teamsters Local 208.

STATEMENT OF THE CASE

Rozay's, a small trucking company, and Teamsters Local 208 were parties to a collective bargaining agreement which

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* Teamsters Local 208 did not petition the Ninth Circuit for rehearing.

expired on September 30, 1981. Southwest Administrators, 791 F.2d at 771. Pursuant to this agreement Rozay's made monthly pension contributions on behalf of its employees to the Trust. Id. After the agreement expired and while negotiations were continuing over a successor agreement, Rozay's continued to make the required contributions. Id.

In approximately November 1981, Rozay's and Teamsters Local 208 agreed to a tentative successor agreement which Teamsters Local 208 was to prepare. Rozay's Transfer, 850 F.2d at 1331. Rozay's, however, did not receive a draft agreement until April 18, 1982. Id. Because the draft contained

several errors, Rozay's, on May 6, 1982, returned the document to Teamsters Local 208 with corrections. Id. Rozay's never received a corrected draft of this document. Id.

During this six month period, Rozay's experienced severe financial difficulties. Rozay's Transfer, 850 F.2d at 1327, 1331. Indeed, an accountant on behalf of Teamsters Local 208 predicted a net loss of $17,508 for Rozay's in 1982. Thus, on June 11, 1982, Rozay's, after first discussing the matter with officials of Teamsters Local 208, mailed the union a certified letter, proposing various economic concessions including cessation of pension contributions. Id. at 1331.

Although Teamsters Local 208 received the letter, it never replied. Id. Rozay's also made several telephone calls to Teamsters Local 208, which were never returned, in an attempt to get a response to the proposed concessions.

On June 28, 1982, Rozay's sent a second certified letter to Teamsters Local 208 which stated that because Rozay's had not received a response to the June 11, 1982 letter, it assumed Teamsters Local 208 had no objection to the proposed changes and would, therefore, implement the changes on July 6, 1982. When Teamsters Local 208 did not respond to the second letter, Rozay's implemented the proposed changes. See

Southwest Administrators, 791 F.2d at 771; Rozay's Transfer, 850 F.2d at 1331.

In September and November 1982, several months after Rozay's implemented the changes, Teamsters Local 208 filed an unfair labor practice charge with the N.L.R.B. and a grievance alleging, in part, that the cessation of pension contributions was an unfair labor practice and violated the collective bargaining agreement. Southwest Administrators, 791 F.2d at 771.

On January 17, 1983, while the N.L.R.B. charge and the grievance were pending, Mr. Rozay, Murrietta, and Maurice L. Anderson, then Director of

the Western Conference of Teamsters and an International Vice President of the Teamsters, met and negotiated a settlement of the charge and grievance. See Southwest Administrators, 791 F.2d at 771. Under the terms of the settlement, Rozay's and Teamsters Local 208 would execute a collective bargaining agreement under which Rozay's would resume making the 98 cents per hour pension contributions prospectively. Id. at 771. In exchange, Teamsters Local 208 agreed to accept lower wages of $1.00 per hour. Id. It was also agreed that Rozay's would not be obligated to pay the unpaid pension contributions for the previous months. Id. By this agreement, Rozay's would not exacerbate its already precarious

financial situation because the prospective resumption of pension contributions would be offset by the wage reduction. Rozay's Transfer, 850 F.2d at 1327.

The subject of the unpaid pension contributions was specifically discussed by the parties. As the Ninth Circuit stated in Southwest Administrators:

> "In light of the company's precarious financial position, Rozay expressed serious concerns about being required to make retroactive pension fund contributions for the period between May, 1982 and February, 1983. . . . Murrietta and Anderson assured Rozay that the delinquent payments would be forgiven noting that the trust fund had waived the unpaid pension contributions of other employers under similar circumstances." 791 F.2d at 771-72.

Following the January 17, 1983 meeting, Mr. Rozay sent a letter dated January 21, 1983 to Murrietta with a copy to Anderson, confirming the terms of the January 17, 1983 agreement that there would be no retroactive pension contributions. See Rozay's Transfer, 850 F.2d at 1327. In his reply letter, Murrietta did not deny Mr. Rozay's characterization of the settlement agreement as it related to pension contributions. Id.

Pursuant to the January 17, 1983 agreement, Murrietta, on January 26, 1983, wrote the Trust on behalf of Rozay's, requesting relief from payment of the retroactive pension contribu-

tions. Rozay's Transfer, 850 F.2d at 1327.

On February 16, 1983, the trustees of the Trust voted to deny the request to forgive Rozay's unpaid pension contributions. Rozay's Transfer, 850 F.2d at 1330. The Trust's decision meant that Rozay's would owe the Trust $76,133.29 in addition to liquidated damages and interest if Mr. Rozay signed the Agreement. This development transformed the January 17, 1983 agreement from an agreement tailored to help Rozay's survive its mounting economic difficulties by keeping its costs stable into something completely different -- the assumption of an over $76,133.29 debt. Id.

On March 4, 1983 at a Teamster's social function, a Trust representative told Murrietta of the Trust's decision. Rozay's Transfer, 850 F.2d at 1327-28. Rozay's was not informed of the Trust's decision until late March 1983. Id. at 1335.

On March 8, 1983, Murrietta and Mr. Rozay met to execute the documents which confirmed the January 17, 1983 agreement. Southwest Administrators, 791 F.2d at 772. These documents included the Agreement, the side agreement resolving the grievance and N.L.R.B. unfair labor practice charge, and the Employer-Union Pension Certification. Id.

When Murrietta and Mr. Rozay met on March 8, 1983 to sign these documents, Murrietta knew of Rozay's severe financial problems. Teamsters Local 208's own accountant had confirmed the adverse economic news, and Mr. Rozay had explained his company's financial problems to Murrietta. See Rozay's Transfer, 850 F.2d at 1327, 1331. It is also undisputed that Murrietta knew, having read Mr. Rozay's letter dated January 21, 1983, that Mr. Rozay believed that the January 17, 1983 agreement included only prospective pension payments and not retroactive pension contributions.

Yet despite these facts and although Murrietta knew the retroactive

pension contributions was the key to the entire Agreement, he did not tell Mr. Rozay what he had learned four days earlier -- that the nature of the Agreement had been completely changed by the Trust's decision not to waive the unpaid contributions. Rozay's Transfer, 850 F.2d at 1328. Murrietta intentionally failed to advise Mr. Rozay of the Trust's decision because he knew that if Mr. Rozay were told that the unpaid contributions of $76,133.29 would not be forgiven, Mr. Rozay would not have signed the three documents. Id. As the district court stated in Finding of Fact No. 24:

> "At the time that Murrietta and Mr. Rozay signed the March 8, 1983 collective bargaining agreement, Murrietta knew that the Trustees

had voted not to forgive Rozay's unpaid contributions, but he did not disclose this fact to Mr. Rozay. The existence of an obligation to pay the $76,133.29 in unpaid contributions was a material fact. Murrietta did not disclose this fact to Mr. Rozay because he knew that if Mr. Rozay was told that the past contributions would not be forgiven, Mr. Rozay would not execute the collective bargaining agreement."*

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* As the district court said in Southwest Administrators:

> "At the very moment [Mr. Rozay] signed [the Agreement], Murrietta knew very well indeed that the motivating reason for Mr. Rozay to go into this transaction had been negated, and he didn't tell him about it. Now if that is not fraud, then I have never seen it." (App. A at A-8.)

See also Southwest Administrators, 791 F.2d at 774 ("[t]he fraudulent misrepresentation . . . went directly to the employer's central motivation for entering into the agreement.")

Mr. Rozay, assuming that unpaid contributions would be forgiven, signed the Agreement, side agreement, and the pension agreement. Rozay's Transfer, 850 F.2d at 1328. Teamsters Local 208 thereafter withdrew the N.L.R.B. unfair labor practice charge and the grievance. Southwest Administrators, 791 F.2d at 772.

Subsequently, the Trust filed the Southwest Administrators suit against Rozay's to collect the retroactive pension contributions, and Rozay's, thereafter, filed the present case

against Teamsters Local 208 pursuant to Section 301.*

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* Teamsters Local 208's Petition suggests that Rozay's delayed filing the present lawsuit or failed to request that the Agreement be renegotiated and that this somehow indicates that Rozay's was satisfied with the extra $76,133.29 unbargained for debt. Petition at 5. There, however, was no delay in filing the present lawsuit and no opportunity to renegotiate the Agreement. As the Ninth Circuit explained:

> "It was not until the deposition of Uranga [a Trust official] on April 30, 1984 . . . when the contract had nearly expired, that Rozay's Transfer first learned of Murrietta's fraud, and it was not until March 12, 1985 during the Southwest Administrators trial and after the contract had expired, that Murrietta finally confessed to his concealment." Rozay's Transfer, 850 F.2d at 1328.

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION UNDER SECTION 301 TO DECIDE ROZAY'S FRAUD CLAIM BASED ON TEAMSTERS LOCAL 208'S CONTRACTUAL MISREPRESENTATIONS.

Teamsters Local 208 did not contest the district court's Section 301 jurisdiction below and in fact stipulated in the Pre-Trial Conference Order, without any objection, that the district court's subject matter jurisdiction was invoked "upon grounds that this is an action pursuant to [Section

301]." (App. B at B-3.)* After losing at the district court, Teamsters Local 208, for the first time, contended before the Ninth Circuit that the district court did not have jurisdiction to award damages because this case was preempted by ERISA. Having lost before the Ninth Circuit, Teamsters Local 208 now contends, for the first time, to this Court that the district court did not have proper subject matter jurisdiction to hear the present dispute because Section 301's grant of jurisdiction over "suits for violations of [labor] contracts" does not give

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* The Pre-Trial Conference Order is reproduced as Appendix B, infra, pages B-1 -- B-26.

courts jurisdiction to determine a labor contract's validity. Teamsters Local 208 did not give the Ninth Circuit an opportunity to consider this contention either during the appeal or subsequently by requesting reconsideration of the decision.*

Teamsters Local 208's latest and limited analysis of Section 301 is, in any event, wrong for several reasons.

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* Significantly, in their briefs to the Ninth Circuit, Local 208 and the amici curiae Southern California District Council of Laborers and International Union of Operating Engineers, Local Union No. 12 only challenged the propriety of the district court's remedies under Section 301 and repeatedly conceded that the district court had jurisdiction under Section 301 to rule on the Agreement's validity.

First, it is not even necessary to reach the jurisdictional controversy which Teamsters Local 208 attempts to manufacture because its contractual misrepresentations fall squarely within Section 301's ambit even if that provision is read narrowly to preclude consideration of a labor contract's validity. Second, the conflict among the circuits which Teamsters Local 208 perceives is illusory. The decision below is consistent with the Congressional intent, this Court's own rulings that Section 301 be read broadly, and with the emerging consensus of circuit opinions.

A. Even If There Is A Conflict Among The Circuits About The Application Of Section 301 Only To Valid Contracts, It Is Irrelevant To This Case Since The Ninth Circuit In Southwest Administrators Found A Valid Collective Bargaining Agreement.

Even if there were a genuine conflict of authority concerning Section 301 jurisdiction over cases involving a labor contract's validity, such a conflict has no bearing on the outcome of the present case. The same result would have been reached irrespective of the Agreement's validity. Indeed, in Southwest Administrators,

the Ninth Circuit held that the Agreement was valid, a "voidable" but not "void" agreement. Southwest Administrators, 791 F.2d at 774. Because a valid underlying labor contract is a condition precedent for a trust fund's collection action against an employer for delinquent contributions, Rozay's could not have been adjudged liable in Southwest Administrators had the Agreement been invalid. As the Ninth Circuit explained, "Without [the Agreement], the trust fund would not have been able to pursue its prior action under Section 515 of ERISA, 29 U.S.C. § 1145, to collect these contributions, for an action under Section 515 is available only to collect 'promised contributions.'" Rozay's

Transfer, 850 F.2d at 1334 quoting Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., ___ U.S. ___, 108 S. Ct. 830, 832, 98 L. Ed. 936, 942 (1988). Thus, Teamsters Local 208's assumption that the district court's jurisdiction was dependent upon its power to declare a labor contract invalid is incorrect. There was a valid Agreement. The Trust's suit against Rozay's was based on that Agreement, and both Rozay's and Local 208 abided by the Agreement throughout its term. See Rozay's Transfer, 850 F.2d at 1328.

Indeed, by emphasizing the Agreement's rescission, Teamsters Local 208 loses sight of what this case is really

about -- Teamsters Local 208's fraudulent contractual misrepresentations and what remedies flow from that wrongdoing and not the Agreement's validity.* The district court's decision to rescind the Agreement is only one of many appropriate contract remedies. See, e.g., 12 S. Williston, A Treatise On The Law Of Contracts § 1523 (3d ed. 1970); Food Handlers Local 425, etc. v. Valmac Industries, Inc., 528 F.2d 217, 219 (8th Cir. 1975) (union's reformation suit against employer for fraud in the course of executing a labor

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* The district court's rescission of the Agreement is a nice gesture but nothing more. Whether rescinded or not, Rozay's is liable to the Trust for over $122,789.03 solely because of the Agreement.

agreement). Thus, because this case involves a contractual violation -- Teamsters Local 208's contractual misrepresentations -- the question of Section 301's scope need not be addressed.

B. The Ninth Circuit's Decision Is Consistent With The Congressional Intent Underlying Section 301, This Court's Decisions Interpreting That Provision, And The Evolving Consensus Of Circuit Opinions.

1. The Ninth Circuit's Interpretation Of Section 301 Is Consistent With The Statutory Intent And This Court's Decisions.

The Ninth Circuit's interpretation of Section 301 is consistent with the statutory intent and this Court's

repeated rulings that Section 301 should be read broadly. In enacting Section 301, Congress determined that labor peace would be fostered if the courts rather than the N.L.R.B. were given jurisdiction to decide disputes of a contractual nature. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 454-55 (1957).* In granting the judiciary such authority, Congress expected the federal courts to develop a uniform common law of labor contracts. As this Court explained, Section 301 is "a congres-

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* Congress specifically rejected language which would have allowed disputes involving "violations of contract" to be heard by the N.L.R.B. as well as by the courts. Lincoln Mills, 353 U.S. at 452-53 n.3.

sional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985) (emphasis added). Indeed, Congress made it clear that it did not seek to frustrate this goal by unduly limiting the type of actions within Section 301's ambit:

> "[Section 301] contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers . . . to secure declarations from the Court of legal rights under the contract."

93 Cong. Rec. 3656 (1947) (statement of Rep. Barden), quoted in Lincoln Mills,

353 U.S. at 455-56. To accomplish these goals of labor peace and the creation of a uniform federal law of labor contracts, this Court has consistently read Section 301 broadly. See, e.g., Smith v. Evening News Ass'n, 371 U.S. 195, 199 (1962) ("§ 301 is not to be given a narrow reading"); McNally Pittsburg, Inc. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 812 F.2d 615, 619 (10th Cir. 1987) ("The dual purposes of § 301, to promote industrial peace and develop uniform law, demand that the statute be construed broadly").*

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* In Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), the Court, considering Section 301 preemption of
(Footnote Continued)

Consistent with this Court's broad approach, the Second, Third, Fifth, Tenth, and Eleventh as well as the Ninth Circuit courts have all recognized that Section 301 encompasses questions of contact validity.

(Footnote Continued)
state tort actions, reemphasized the expansive scope of Section 301, no matter the label -- contract or tort -- placed on the action:

> "[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims as claims for tortious breach of contract." Id. at 211.

Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 181-82 (2d Cir. 1962) ("We find nothing in the history of Section 301(a) which indicates an intention to restrict that section to suits for damages or specific enforcements"); Mack Trucks, Inc., v. International Union, UAW, No. 87-1650, slip op. at 15-22 (3d Cir. Sept. 12, 1988) (district court has jurisdiction under Section 301 to decide the existence of a labor contract); United Steelworkers of America v. Rome Ind., Inc., 437 F.2d 881, 882-83 (5th Cir. 1970) (it is unnecessary to allege contract breach because "the court was empowered to decide the issue of existence of a contract"); McNally Pittsburg, Inc. v. Interna-

tional Ass'n of Bridge, Structural & Ornamental Iron Workers, 812 F.2d 615, 617-19 (10th Cir. 1987) (trial court had jurisdiction under Section 301 to consider a complaint which addresses only the validity and not a violation of a labor contract); Board of Trustees v. Universal Enterprises, Inc., 751 F.2d 1177, 1184 (11th Cir. 1985) ("a district court has jurisdiction under Section 301 to make a determination as to whether a collective bargaining agreement in fact exists"); Associated General Contractors, Inc. v. Laborers International Union, 476 F.2d 1388, 1402 n.25 (Em. Ct. App. 1973) ("the question of whether a collective bargaining agreement has been validly entered into in the first instance

have been held to be so related to the subject of 'suits for violation of' labor contracts as to permit their resolution by district courts by virtue of [Section 301]").

Indeed, this Court has suggested the very same result in Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). Charles Dowd held that a state court could assert jurisdiction over a Section 301 suit seeking a declaration that a contract existed so long as the state court applied federal law. Id. at 507. In so ruling, this Court implicitly recognized that a court may do exactly what the district court did below -- rule on a labor contract's validity.

2. There Is No Genuine Conflict Among The Circuits With Respect To A Court's Jurisdiction Under Section 301 To Decide A Labor Contract's Validity.

As is evident from the opinions of the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits, the evolving consensus is that a court may decide a labor contract's validity under Section 301. Recently, for example, the Third Circuit distinguished several of its earlier opinions which are relied upon by Teamsters Local 208 and concluded that Section 301 grants courts the jurisdiction to determine a labor

contract's validity. Mack Trucks, Inc. v. International Union, UAW, No. 87-1650 slip op. at 20-22 (3d Cir. Sept. 12, 1988) (jurisdiction over declaratory judgment action that a contract existed). The Third Circuit rejected the same limited interpretation of Section 301 which Teamsters Local 208 now posits in its Petition:

> "This view [that courts cannot rule on a labor contract's validity] . . . ignores Congress' broader concern that the courts -- as opposed to the NLRB -- be granted authority to decide disputes of a contractual nature." Mack Trucks, No. 87-1650, slip op. at 17.

Only the Seventh Circuit decision in NDK Corp. v. Local 1550, United Food & Commercial Workers, 709 F.2d 491 (7th Cir. 1983) seems to conflict with the

decision below. In NDK the Seventh Circuit, without reference to any contrary decisions by this Court, chose to adopt a limited reading of Section 301, holding that it "provides jurisdiction for suits for violation of contracts but not for determinations of the validity of contracts where validity is the ultimate issue." Id. at 493.

Recently, however, the Seventh Circuit has indicated that it may retreat from NDK's narrow reading of Section 301. It acknowledged that NDK conflicts with the decisions of other circuits and warned:

> "NDK may not be our Court's final word on the several complex jurisdictional issues raised by union and employer efforts to invoke the

> § 301 LMRA jurisdiction of the federal courts in cases involving, inter alia, the question of whether a particular employer is bound by the terms of an existing, valid collective bargaining agreement." International Brotherhood of Electrical Workers, Local 481 v. Sign-Craft, Inc. 851 F.2d 910, 914 (7th Cir. 1988).

The remaining cases which Teamsters Local 208 cites do not in any way conflict with the decision below. While these cases stress Section 301's literal language that the provision encompasses suits for "violations" of labor contracts, they do not necessarily reject the broad approach which recognizes that this jurisdictional grant allows courts to decide a contract's validity. Indeed, each of these cases is distinguishable from the present case because they concern

matters which have nothing to do with a labor contract as a contract, the focus of Section 301. Because these cases, instead, were non-contractual, involving pure labor questions such as representational issues which are traditionally decided by the N.L.R.B., the courts properly found no Section 301 jurisdiction. See Hernandez v. National Packing Co., 455 F.2d 1252, 1253 (1st Cir. 1972) (issue described as one of contract "validity" is really a representational issue based on the employer's "supposition that the [union] no longer reflects the wishes of the majority of the bargaining unit"); A.T. Massey Coal Co. v. International Union, United Mine Workers, 799 F.2d 142, 144 (4th Cir. 1986),

cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987) (declaratory judgment action that employer and its affiliates are not bound by contract negotiated by one of its affiliates); Mengel Co. v. Nashville Paper Products & Specialty Workers Union, 221 F.2d 644, 645 (6th Cir. 1955) (employer's declaratory judgment action seeking to declare invalid an arbitration award based on employer's contention that the collective bargaining agreement did not limit the employer's ability to discharge at-will); International Brotherhood of Electrical Workers, Local 481 v. Sign-Craft Inc., 851 F.2d 910 (7th Cir. 1988) (representational issue of whether an employer

properly repudiated a multi-employer agreement).

The present case, by contrast, involves straightforward contract issues: when does a contracting party's fraudulent concealment of a material fact result in actionable damages. This is a fundamental issue of contract formation and just the sort of contractual question Congress preferred the courts rather than the N.L.R.B. resolve. See Board of Trustees v. Universal Enterprises, Inc., 751

F.2d 1177, 1184 (11th Cir. 1985) (Section 301 jurisdiction is proper because "the question whether a contract was in existence is purely a matter of contract law").*

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* Teamsters Local 208's Petition also relies upon two Third Circuit decisions decided before Mack Trucks, Adams v. Budd Co., 349 F.2d 368 (3d Cir. 1965) and Leskiw v. Local 1470, International Brotherhood of Elec. Workers, 464 F.2d 721 (3d Cir.), cert. denied, 409 U.S. 1041 (1972). In both cases, employees sued their union and employer for disregarding their interests during the course of negotiations. Adams, 349 F.2d at 369-70; Leskiw, 464 F.2d at 722-23. The recent Mack Trucks decision distinguished these two cases because, just like the First, Fourth, and Sixth Circuit cases discussed above which Local 208 cites, they involve claims which are independent of the labor contract and, therefore, are not proper Section 301 claims. Mack Trucks, No. 87-1650, slip op. at 20-21. Mack Trucks also distinguished the First

(Footnote Continued)

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Circuit's Hernandez decision and the Seventh Circuit's NDK decision, noting that these cases "merely concluded that the plain language of § 301 bars jurisdiction to consider a suit concerning the existence of a collective bargaining agreement." Id. at 21 n.10.

The inconsistency which Teamsters Local 208 sees in previous Ninth Circuit decisions (Petition at 9 n.3) only reflects an evolving consensus. Recent Ninth Circuit cases have uniformly adopted a broad interpretation of Section 301 which comports with this Court's analysis. International Brotherhood of Electrical Workers, Local 532 v. Brink Construction Co., 825 F.2d 207, 212 (9th Cir. 1987); John S. Griffith Construction Co. v. United Brotherhood of Carpenters & Joiners, 785 F.2d 706, 712 (9th Cir. 1986). In any event, Teamsters Local 208 should have called its perceived "inconsistency" to the Ninth Circuit's attention in its appeal or by a motion for hearing en banc. Having failed to give the Ninth Circuit this opportunity to "correct" any

(Footnote Continued)

II. THERE IS NO CONFLICT AMONG THE CIRCUITS THAT SECTION 301 GIVES FEDERAL COURTS CONCURRENT JURISDICTION EVEN OVER MATTERS WHICH MAY ARGUABLY BE UNFAIR LABOR PRACTICES.

Teamsters Local 208 argues that the decision below conflicts with San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) and its progeny. These cases hold that the N.L.R.B. possesses primary jurisdiction over activities which are arguably

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(Footnote Continued)
claimed "inconsistency," it is now too late to raise this issue with this Court.

unfair labor practices. There is, however, no such conflict between the present case and Garmon.

This case falls squarely within the broad exception to Garmon preemption which Congress carved out when it enacted Section 301. As noted above, this provision gives the judiciary rather than the N.L.R.B. subject matter jurisdiction over disputes arising out of labor contracts. This Court has repeatedly affirmed the broad scope of Section 301 jurisdiction even over matters which may arguably be unfair labor practices. In Smith v. Evening News Ass'n, the Court stated:

> "The authority of the Board to deal with an unfair labor practice

which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the Courts in suits under § 301."* 371 U.S. at 197.

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* See also Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274, 300 (1971) ("We have exempted § 301 suits from the Garmon principle because of the evident congressional determination that courts should be free to interpret and enforce collective-bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act").

Thus, because the present case falls within the jurisdictional ambit of Section 301, the district court had jurisdiction over this case even if Teamsters Local 208's contractual misrepresentations may also constitute an unfair labor practice subject to the N.L.R.B.'s concurrent jurisdiction.*

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* None of the cases which Teamsters Local 208 cites attempts to repeal Section 301 nor say what Teamsters Local 208 desperately wants them to say -- that a union's fraudulent conduct in the procurement of a labor contract is exclusively a N.L.R.B. matter and not within the Section 301 jurisdiction of the federal courts. Both Lexington Cartage Co. v. International Brotherhood of Teamsters, etc., 713 F.2d 194 (6th Cir. 1983) and Mo-Kan Teamsters Pension Fund v. Creason, 716 F.2d 772 (10th Cir. 1983), cert. denied, 464 U.S. 1045 (1984), for example, involved representational issues -- the employers' contention

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that the unions lacked majority status. These cases did not implicate Section 301's contract concerns nor did they hold that contract formation issues such as fraud are not within Section 301's jurisdiction. Indeed, Mo-Kan contrasted the question of majority status with the contract formation defense of illegality which it conceded may be asserted under Section 301. 716 F.2d at 775.

Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 3242, 97 L. Ed. 2d 747 (1987), does not even discuss the Garmon principle of primary jurisdiction. In Anderson, the Eighth Circuit concluded there was no Section 301 jurisdiction because the plaintiffs' claims of permanent-status employment were neither based on nor referred to the collective bargaining agreement. Id. at 958. By contrast, not only did the source of Rozay's obligation to make the disputed trust fund contributions arise because of Teamsters Local 208's contractual misrepresentations and because the fraudulently induced Agreement was

(Footnote Continued)

III. THE NINTH CIRCUIT'S DECISION THAT A UNION MAY BE LIABLE FOR INTENTIONALLY MISREPRESENTING MATERIAL FACTS DURING THE COLLECTIVE BARGAINING PROCESS NEITHER CONFLICTS WITH RELATED DECISIONS RENDERED IN OTHER CIRCUITS NOR RAISES IMPORTANT QUESTIONS OF FEDERAL LABOR LAW.

As the Ninth Circuit acknowledged, other than in the present case, no other court has ruled on the narrow issue presented by Teamsters Local 208's fraud defense: whether a union may, with impunity, engage in the most

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(Footnote Continued)
signed, but also the factual finding of fraud is based on a lengthy analysis of the Agreement and the negotiations leading up to it.

"disgusting" fraud so long as the deceit involves factual misrepresentations concerning trust fund actions. Rozay's Transfer, 850 F.2d at 1330.

None of the cases cited by Teamsters Local 208 supports its asserted and novel right to deceive an employer. Indeed, the cases Teamsters Local 208 cites stand for the proposition that it is unreasonable for an employer to rely on a union's advice with respect to trust fund policy or ERISA obligations. See Knoll v. Phoenix Steel Corp., 465 F.2d 1128, 1132 (3d. Cir. 1972), cert. denied, 409 U.S. 1126 (1973) (misrepresentation concerning an issue of trust policy -- whether lump sum pension payments could be made); Martin

v. Hamil, 608 F.2d 725, 729 (7th Cir. 1979) (misrepresentation concerning employers' ability to make pension contributions on their own behalf); Teamster's Local 348 Health & Welfare Fund v. Kohn Beverage Co., 749 F.2d 315, 317 (6th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (misrepresentation concerning employer's obligation to make pension contributions for non-union employees); Galvez v. Local 804 Welfare Trust Fund, 543 F. Supp 316, 317 (E.D.N.Y. 1982) (misrepresentation concerning employee's entitlement to retirement benefits); Chambless v. Masters, Mates & Pilots Pension Plan, 571 F. Supp. 1430, 1451 (S.D.N.Y. 1983) (misrepresentation concerning conduct constituting forfei-

ture of pension benefits); Ridens v. Voluntary Separation Program, 610 F. Supp. 770, 772, 774 (D. Minn. 1985) (misrepresentation concerning employee's ability to collect severance benefits).

These cases, however, are irrelevant. Teamsters Local 208's fraud concerns the concealment of material facts and not mistaken advice regarding legal obligations to the Trust. As the Ninth Circuit emphasized below in distinguishing similar cases, the present matter has nothing to do with Mr. Rozay's perception of Murrietta's status, i.e., Mr. Rozay did not rely on Murrietta's explication of Trust policy

or his analysis of ERISA obligations. Rozay's Transfer, 850 F.2d at 1329.

> "In the present case, Rozay's Transfer alleges that the union intentionally misrepresented a material fact by failing to disclose that its obligation to the trust fund would not be forgiven. Rozay's Transfer did not miscomprehend its legal obligations to the fund, rather, it misunderstood the state of facts, known to the union, existing at the time it entered into a separate agreement with the union." Id. (emphasis in original).

Thus the rationale underlying the cases cited by Teamsters Local 208 -- that an employer cannot justifiably rely on a union's advice concerning trust policy -- is simply not relevant here. Indeed, as the Ninth Circuit concluded: "the union has

cited no authority or sound legal principle nor can we discern any, explaining why rules pertaining to fraudulent inducement should not apply to the formation of labor contracts."* Rozay's Transfer, 850 F.2d at 1330.

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* The cases which Teamsters Local 208 relies upon are distinguishable for other reasons as well. Only Galvez concerns a fraudulent misrepresentation made by a union representative. Galvez rejected the fraud claim, not because the plaintiff/employee's reliance on the union's misrepresentation regarding trust policy was unreasonable, but rather because the plaintiff failed in other respects to establish the elements of fraud. Galvez, 543 F. Supp. at 318.

One case cited by Local 208 actually held that an employee's reliance on a union's advice with respect to pension policy was justified given the close relationship between the trust fund and the union official. Oates v. Teamsters Affiliates Pension

(Footnote Continued)

CONCLUSION

For all the reasons stated, the decision below is not in conflict with the decisions of other courts of appeal or of this Court. Respondent Rozay's

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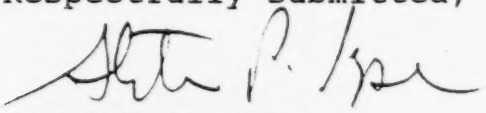
(Footnote Continued)
Plan, 482 F. Supp. 481, 488 (D.D.C. 1979). As an alternative analysis of Teamsters Local 208's fraud, the Ninth Circuit similarly stated that because the decision to forgive retroactive pension contributions was discretionary and because there was a commonality of interests between Teamsters Local 208 and the Trust, it was not unreasonable as a matter of law for Rozay's to believe that Teamsters Local 208 could favorably influence the Trust. Rozay's Transfer, 850 F.2d at 1328-29.

Transfer respectfully submits that the Petition for a Writ of Certiorari should be denied.

DATED: October 20, 1988.

Respectfully submitted,



STEPHEN P. PEPE
(Counsel of Record)
CLIFF FONSTEIN
O'MELVENY & MYERS
400 South Hope Street
Fifteenth Floor
Los Angeles, California
90071-2899
Counsel for Respondent
Rozay's Transfer

Appendix A

In the United States
District Court
For The Central District
Of California

Before the
Honorable Mariana R. Pfaelzer, Judge

No. CV-83-4194 MRP

SOUTHWEST ADMINISTRATORS, INC.,
Plaintiff,

vs.

ROZAY'S TRANSFER,
Defendant.

Los Angeles, California
Friday, May 24, 1985
1:30 p.m.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

THE CLERK: Item No. 4, Civil 83-4194, Southwest Administrators, Inc. versus Rozay's Transfer.

Counsel, please make your appearances.

MR. PEPE: Good afternoon, your Honor. Stephen Pepe and Cliff Fonstein on behalf of defendant Rozay's Transfer.

MS. WALDECK: Patricia Waldeck of Pappy, Kaplon, Vogel & Phillips for plaintiff.

THE COURT: All right. Now sit down for just a minute. I want to talk to you.

Now we are going up against a body of established law, in my opinion, that makes these defenses that can be raised

against a trust fund very difficult to deal with.

Now if I have ever in my life seen a case of pure fraud it is this case.

Mr. Murrietta deliberately, willfully, and knowingly defrauded Mr. Rozay. There isn't the slightest doubt about it. The reason I had you come here is that I wanted to say that on the record. I have said that in the findings. I did not believe the testimony of Mr. Murrietta.

I do not believe that Mr. Anderson from the evidence before me did anything wrong, but I have never in my life seen a situation which was clearer

in terms of fraudulent conduct than this situation with respect to Mr. Murrietta.

Now that being the case, I made a finding that there was fraud and then I on one more occasion have gone through all of the cases and I cannot find that under the law of the Ninth Circuit that gives a defense to Mr. Rozay against the trust fund. Now I do believe that what must be done immediately is that there has to be some consideration given to an action brought against Mr. Murrietta and the union and if you believe that there is any other finding that should be made to make more clear what I am now saying, I am perfectly prepared to have

you come back and make an application for it.

I would have found for Mr. Rozay if there was any way for me to do it. I am totally and absolutely disgusted with the behavior in this case, but I believe that my hands are tied.

Now what did I do besides reading all the cases myself? Well, I had my clerk read all of the cases without telling my clerk what conclusion to reach. I just told the clerk what I had found and said, "Now what do you see from looking at all of the cases?" And the result was the same. Then I reread all the cases again. Now I don't think that the contract is

ambiguous. If there has ever been a situation where it doesn't appear that there was any meeting of the minds, this is it. There is no question about it. There is no doubt about the fact that Mr. Rozay knew he was signing a collective bargaining agreement, and under the cases that I had in front of me, it doesn't seem to me I have any choice but to follow the cases that are in the Ninth Circuit.

If I were the trust fund knowing that that was the feeling of the Court I would come to an accommodation about this because it is a disgusting set of facts, and I am using the word "disgusting" deliberately with very calm reflection.

I do not regard it as proper conduct on the part of a union to defraud an individual who is negotiating with them, and then have the trust fund take the benefit of it, and that is exactly what happened here.

Now if I have made myself clear that is all I have to say.

MR. PEPE: Thank you, your Honor. We appreciate your comments.

THE COURT: It is the most unfair conduct I have ever seen.

MR. PEPE: We agree with you, your Honor.

THE COURT: You just can't conceive of a situation where a trust fund should get the benefit of that kind of conduct, but under the Ninth Circuit case law, I think the trust fund does not -- or you can't assert against the trust fund a defense such as this. He knew that it was a collective bargaining agreement. He went into it not knowing what he was doing; that is to say, he was assuming that the facts were other than what they actually were. At the very moment he signed it, Murrietta knew very well indeed that the motivating reason for Mr. Rozay to go into this transaction had been negated, and he didn't tell him about it. Now if that is not fraud, then I have never seen it.

All right. So now you have the findings and the judgment. The reason I am having you in here is that if there is anything that you think that I should do to add to the findings, I am prepared to do that if I reasonably can because the result I have reached is totally inequitable. It is the wrong result on this set of facts, but I think I am bound by this case.

MR. PEPE: I appreciate your comments, your Honor. We will take a look at the findings over the weekend and we will see if we want anything additional.

THE COURT: I don't believe Anderson did anything wrong at all. I

think he did everything he was supposed to, even though he wasn't here to testify. I thought about that a great deal, and I don't know what would have happened if he had been the one who had gone over there or if he had been present at the time. I doubt that he would have let that happen.

MR. PEPE: I think that is correct, your Honor.

THE COURT: Thank you.

MR. PEPE: Thank you, your Honor.

THE COURT: Incidentally, Ms. Waldeck, this is no reflection on you

as a lawyer or on the trust fund. Do you understand that?

MS. WALDECK: Yes.

THE COURT: I have to make this clear on the record because I feel this is one of the very few times when I feel really that I have done the wrong thing. Thank you.

MR. PEPE: Thank you, your Honor.

MR. ROZAY: Thank you.

(Proceedings concluded)

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE FOREGOING MATTER.

/S Beth E. Culberston — July 19, 1985

BETH E. CULBERTSON, CSR — DATE

Appendix B

United States District Court
Central District of California

Case No. CV-84-8313 MRP (Bx)

ROZAY'S TRANSFER,
Plaintiff,

vs.

LOCAL FREIGHT DRIVERS, LOCAL 208,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
Defendant.

PRE-TRIAL CONFERENCE ORDER

[Filed January 14, 1986]

Pursuant to Rule 16 F.R.Civ.P., Local Rule 9, IT IS ORDERED:

1. This is an action for rescission or, in the alternative, for indemnification and for fraud. The parties are Rozay's Transfer ("Rozay's"), a California corporation, plaintiff, and Local Freight Drivers Union, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("Local 208"), defendant. The pleadings which raise the issues are as follows:

a. Complaint for rescission or, in the alternative, for indemnification and for fraud.

b. Answer to complaint.

2. Federal jurisdiction and venue are invoked upon the grounds that this is an action pursuant to Section 301(a), Labor-Management Relations Act, 29 U.S.C. §185(a).

3. The parties are essentially in agreement as to the facts and, therefore, it is estimated the trial will not take more than (1) day.

4. The trial is to be to the court.

5. The following facts are admitted and require no proof:

a. Plaintiff Rozay's is a California corporation engaged in the trucking industry in Southern California.

b. The truck drivers and dock workers employed by Rozay's are now and for several years have been represented for purposes of collective bargaining by defendant Local 208.

c. Rozay's and Local 208 were parties to a cc1lective bargaining agreement ("Agreement") and an Employer-Union Pension Certification ("Certification") which expired on September 30, 1981.

d. The Agreement and Certification which expired on September 30, 1981 required Rozay's to make contributions to the Western Conference of Teamsters Pension Trust Fund ("Trust Fund") on behalf of employees represented by Local 208.

e. Rozay's made regular contributions to the Trust Fund during the life of the Agreement and Certification and continued to make contributions after the expiration and through April, 1982, while Local 208 and Rozay's attempted to negotiate a renewal Agreement and Certification.

f. On or about April 18, 1982, Local 208 presented a rough draft of a new collective bargaining agreement to Rozay's. After reviewing the draft, on May 6, 1982, Rozay's returned it unsigned to Local 208 with several corrections.

g. Also on May 6, 1982, Rozay's Vice President, Richard Fletcher ("Fletcher"), raised with Local 208 Business Agent, Eddie McKiernan ("McKiernan"), Rozay's severe economic problems and explained that in order to stay in business, Rozay's would need a reduction in labor costs. Rozay's specifically proposed cessation of

pension contributions, and reduced holiday, vacation, and sick leave benefits.

h. On April 26, 1982, the Trust Fund wrote and informed Rozay's that it could not accept pension contributions unless there was a current agreement between Rozay's and Local 208. On June 30, 1982, the Fund wrote a substantially similar letter to Rozay's.

i. On June 8, 1982, Fletcher again raised the need for concessions with McKiernan and with Local 208's Secretary-Treasurer, Alex Maheras ("Maheras").

Maheras requested that Rozay's make the proposal in the form of a letter.

j. On June 11, 1982, Fletcher on behalf of Rozay's wrote to Maheras to propose labor concessions. Specifically, Fletcher proposed the following: cessation of pension contributions; elimination of one week's vacation; elimination of two personal holidays; and elimination of five days' sick leave. This letter was sent via certified mail.

k. Local 208 received the letter of June 11, 1982, but made no reply.

l. On June 28, 1982, on behalf of Rozay's, Fletcher sent a second letter to Local 208. Fletcher stated that having received no response to its June 11, 1982 letter, Rozay's assumed that the union had no objections to its proposed changes, and the changes would be implemented on July 6, 1982. This second letter was also sent by certified mail.

m. Local 208 received Rozay's letter of June 28, 1982, but made no response.

n. Rozay's implemented the proposals outlined in its June 11, 1982 letter to Local 208 effective July 6, 1982.

o. Rozay's did not make pension contributions to the Trust Fund for the period of May, 1982 through February, 1983.

p. Several months after Rozay's ceased making pension contributions to the Trust Fund, Local 208 filed an unfair labor practice charge with the National

Labor Relations Board ("Board"). The charge was filed on September 20, 1982 and amended on November 1, 1982, under Board Case No. 21-CA-21591. Local 208 also filed a grievance pursuant to the grievance and arbitration provisions of the expired Agreement. The Board charge alleged that the cessation of the payment of pension contributions constituted an unfair labor practice, and the grievance alleged that it was a breach of the collective bargaining agreement.

q. On January 17, 1983, William S. Rozay ("Mr. Rozay"), President of Rozay's met with

Maurice E. Anderson ("Anderson"), International Vice President of the International Brotherhood of Teamsters, and Archie Murrietta ("Murrietta"), President of Local 208. The purpose of this meeting was to resolve the disputes then pending between Rozay's and Local 208. This meeting took place in Anderson's office.

r. At this January 17, 1983 meeting, Anderson represented to Mr. Rozay that the Trust Fund had forgiven unpaid pension contributions of other employers in the past and would see to it that Rozay's would not have to make retroactive contributions for the

period of May, 1982 through February, 1983. Although Anderson did not articulate how he was going to accomplish this, he informed Mr. Rozay during the meeting that he was going to speak with certain people.

s. During this January 17, 1983 meeting, Murrietta represented to Mr. Rozay that he would write a letter to the Trust Fund on behalf of Rozay's requesting that the Trust Fund not require Rozay's to make pension contributions for the period of May, 1982 through February, 1983.

t. A couple of weeks later, Mr. Rozay, anxious to know what was going on, called Anderson concerning this subject and, during that conversation, Anderson told Mr. Rozay that he was doing everything that was necessary and was on the right track to ensure that Rozay's would not have to make pension contributions to the Trust Fund for the period of time in question.

u. Mr. Rozay had no further conversations with Anderson concerning this subject subsequently thereafter.

v. Following the January 17, 1983 meeting, on January 21, 1983, Mr. Rozay wrote a letter to Murrietta, with a carbon copy to Anderson. In this letter Mr. Rozay confirmed his understanding of the terms of the agreement reached on January 17, 1983. Specifically, the letter stated, "No pension contributions will be required for the period April, 1982 through January, 1983."

w. On January 26, 1983, Murrietta sent a reply to Mr. Rozay's letter of January 21, 1983, and sent a carbon copy to Anderson. On the same date,

Murrietta wrote a letter to the Trust Fund requesting that Rozay's be relieved from paying pension contributions for the months of July, 1982 through January, 1983 as he earlier indicated he would do during the January 17, 1983 meeting with Anderson and Mr. Rozay.

x. On February 16, 1983 the Trustees of the Trust Fund met to consider, among other agenda items, whether to forgive Rozay's unpaid pension contributions for the months of May, 1982 through February, 1983. The Trustees voted not to forgive the payment of these contributions.

y. On or about March 4, 1983, Michael Uranga, an employee of Southwest Administrators, the entity who administers the Trust fund in Southern California, told Murrietta at a social gathering that the Trust Fund had decided not to forgive the payment of the unpaid contributions.

z. On March 8, 1983, Murrietta and Mr. Rozay met for the purpose of executing a collective bargaining agreement, an Employer-Union Pension Certification, and a settlement agreement which modified in writing certain provisions of the collective bargaining agreement and resolved

all pending disputes between Rozay's and Local 208 including the Board charge and the grievance.

aa. During this March 8, 1983 meeting, Murrietta did not tell Mr. Rozay that the trustees of the Trust fund had voted not to forgive the payment of the unpaid contributions.

bb. By letter dated March 24, 1983, the Trust Fund notified Murrietta and Mr. Rozay of its decision not to forgive the payment of the unpaid contributions.

cc. After its receipt of this letter, Mr. Rozay did not contact the Trust Fund to determine when the Trust Fund had made its decision not to forgive the payment of the unpaid contributions.

dd. After its receipt of this letter, Rozay's did not contact Local 208 for the purpose of seeking to reopen negotiations and/or rescind, reform and/or amend the collective bargaining agreement Mr. Rozay executed on March 8, 1983.

ee. After its receipt of this letter, Rozay's did not

contact Local 208 for the purpose of seeking any economic relief from Local 208 in light of the Trust Fund's decision not to forgive the payment of the unpaid contributions.

ff. On or about June 20, 1983, the Trust Fund filed an action in this Court captioned, Southwest Administrators, Inc. v. Rozay's Transfer, Case No. 83-4194-MRP ("Southwest") seeking recovery of the unpaid pension contributions, along with interest, liquidated damages, and attorney's fees. In that action, plaintiff Southwest Administra-

tors, Inc., was the assignee and representative of the Trust Fund.

gg. In June 1985, after approximately 4-5 bargaining sessions which took place in approximately November 1984, Local 208 and Rozay's executed a new collective bargaining agreement. During those negotiations, the subject of the Southwest litigation was not discussed and Rozay's did not seek to obtain any economic relief from Local 208 in light of the Trust Fund's decision not to forgive the payment of the unpaid contributions.

hh. On July 6, 1984, Rozay's filed a motion in Southwest for leave to file a third party complaint against Local 208. That conduct represented the first occasion that Rozay's had announced that it wished to reform and/or rescind the collective bargaining agreement Murrietta and Mr. Rozay had executed on March 8, 1983 and/or was seeking monetary relief from Local 208 arising out of Murrietta's conduct culminating in the execution of the collective bargaining agreement or March 8, 1983. At that time, Mr. Rozay was not aware that Murrietta knew that the Trust Fund had already decided not to forgive the payment of the

unpaid contributions on the date that the collective bargaining agreement was executed.

ii. Subsequently thereafter, in Southwest Administrators, this Court held that Rozay's was liable to the Trust Fund for the unpaid pension contributions and entered judgment in favor of Southwest Administrators in the amount of $122,789.03. Added to the amount of back pension contributions ($76,133.92) was $15,226.65 in liquidated damages, $25,039.09 in interest, and $6,390.00 in attorney's fees. The interest Rozay's owes is continuing to accrue

pending appeal of Southwest Administrators.

6. Discovery has been completed.

7. The parties will file a joint exhibit list. Copies of all exhibits previously admitted in Southwest Administrators may be admitted without objection.

8. The parties have exchanged witness lists and agree to make Murrietta and Mr. Rozay available to testify at trial. Except for use as possible rebuttal evidence, neither party intends to present evidence by way of deposition testimony.

9. No law and motion matters are pending or contemplated.

10. Bifurcation of the following issues for trial is ordered:

a. None.

11. The foregoing admissions having been made by the parties, this pre-trial conference order shall supersede the pleadings and govern the

court of the trial of this case, unless modified to prevent manifest injustice.

DATED: January 14, 1986

By /s/Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District Court Judge

O'MELVENY & MYERS
STEPHEN P. PEPE
CLIFF FONSTEIN

By /s/Cliff Fonstein
CLIFF FONSTEIN
Attorneys for the Plaintiff

WOHLNER, KAPLON, PHILLIPS,
VOGEL, SHELLEY & YOUNG

By /s/Robert D. Vogel
ROBERT D. VOGEL
Attorneys for the Defendant